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HAROLD B. WILEY

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1955

No. 504

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,
Petitioner,

vs.

AUDRA H. PALMER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Subject Index

	Page
I. Opinion below	2
II. Jurisdictional statement	2
III. Questions presented for review	3
IV. Statutes and rules involved	3
V. Statement of facts	5
VI. Reasons for granting writ	8
VII. Argument	9
I. The notice of appeal, even though it referred to the date on which the motion for a new trial was denied, was sufficient to invoke the appellate jurisdiction of the Court of Appeals to review the final judgment entered in this case	9
II. The defect (if any) in the notice of appeal ran only to form and should have been disregarded in accordance with the enlightened policy expressed in the Federal Rules of Civil Procedure and in the Judicial Code and the decisions of this court which have construed them	14
VIII. Conclusion	17

Table of Authorities Cited

Cases

Pages

Atlantic Coast Line R. Co. v. Mims (C.C.A. 5, 1952) 199 Fed. (2d) 582 11

Crump v. Hill (C.C.A. 5, 1939) 194 Fed. (2d) 36 16
Cutting v. Bullerdick (C.C.A. 9, 1949) 178 Fed. (2d) 774 .. 14

Hoiness v. United States (1948) 335 U.S. 297 ..... 8, 15, 16

Porter v. Borden's Dairy (C.C.A. 9, 1946) 156 Fed. (2d) 798 15

Safeway Stores v. Coe (U.S. Ct. App., Dist. of Col., 1943) 136 Fed. (2d) 771 12
Shannon v. Retail Clerks etc. Assn. (C.C.A. 7, 1942) 128 Fed. (2d) 553 15
Sobel v. Diatz (U.S. Ct. App., Dist. of Col., 1951) 189 Fed. (2d) 26 12

United States v. Arizona (1953) 346 U.S. 907 ..... 8, 15
United States v. Ellicott (1912) 223 U.S. 524 ..... 8, 10

Voehl v. Indemnity Insurance Co. (1933) 288 U.S. 162 17

Wetherbee v. Elgin etc. Co. (C.C.A. 7, 1953) 204 Fed. (2d) 755 12
Wilson v. So. Rwy. (C.C.A. 5, 1945) 147 Fed. (2d) 165 11

Codes

United States Code, Title 28, Section 777 (repealed June 25, 1948, 62 Stat. 992, Chapter 646, Section 39) 3, 4, 16, 17
United States Code, Title 28, Section 1254(1) 2
United States Code, Title 28, Section 1291 ..... 2, 3
United States Code, Title 28, Section 1332 2
United States Code, Title 28, Section 2111 ..... 3, 4, 8, 15

Rules

Federal Rules of Civil Procedure:
Rule 61 ..... 3, 4, 8, 15, 16, 17
Rule 73(b) 3, 8, 9

Texts

13 Cyclopedia of Federal Procedure 473, Section 60.94. ... 14

14 Cyclopedia of Federal Procedure, Section 6855 16

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AUDRA H. PALMER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

The Petitioner, State Farm Mutual Automobile Insurance Company (a corporation), prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 24, 1955, by which judgment that Court dismissed Petitioner's appeal from a final money judgment

rendered against Petitioner and in favor of Respondent by the United States District Court for the District of Arizona.

I.

OPINION BELOW.

The opinion of the Court of Appeals appears as Appendix A to this petition. The judgment of the Court of Appeals appears as Appendix B to this petition.

II.

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was made and entered on March 24, 1955 (Tr. 357). A petition for rehearing was filed April 22, 1955, and denied September 23, 1955 (Tr. 358).

The jurisdiction of this Court is invoked under the provisions of United States Code, Title 28, section 1254 (1).

The jurisdiction of the Court of Appeals was based on United States Code, Title 28, section 1291 (appeal from a final decision of a District Court of the United States); the jurisdiction of the District Court was based on United States Code, Title 28, section 1332 (diversity of citizenship).

III.

QUESTIONS PRESENTED FOR REVIEW.

Is a notice of appeal which particularizes the terms of the money judgment complained of insufficient as a matter of law to invoke the appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit merely because it recites that Appellant "hereby appeals from the order" denying motion for new trial "insofar as said order * * * grants judgment" to Respondent?

Were not the provisions of United States Code, Title 28, section 777 (repealed June 25, 1948, 62 Stat. 992, c. 646, section 39) incorporated into Rule 61, Federal Rules of Civil Procedure, and do not Rule 61 ("Harmless Error") and United States Code, Title 28, sec. 2111 ("Harmless error") require that appeals be heard on the merits rather than summarily dismissed because of objection (if valid at all) running only to form?

IV.

STATUTES AND RULES INVOLVED.

United States Code, Title 28, sec. 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. * * *"

Rule 73(b) of *Federal Rules of Civil Procedure:*

> "*Notice of Appeal.* The notice of appeal shall specify the parties taking the appeal; shall desig-

nate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken. * * *"

Rule 61, *Federal Rules of Civil Procedure:*

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

United States Code, Title 28, sec. 2111:

"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

United States Code, Title 28, sec. 777 (repealed June 25, 1948, 62 Stat. 992, c. 646, sec. 39):

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the

cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

V.

STATEMENT OF FACTS.

On May 15, 1951, Respondent Palmer as plaintiff filed this action in the District Court of the United States for the District of Arizona, seeking to compel Appellant State Farm Mutual Automobile Insurance Company to pay $10,000 on account of liability claimed to exist in respect of an automobile liability policy issued to one Noller, against whom Respondent had previously obtained a judgment in a personal injury action in the State Court in Arizona (Tr., pp. 3-5).

On July 6, 1954, in the instant action Findings of Fact and Conclusions of Law in favor of Respondent were signed, filed and docketed, directing that judgment be entered in favor of Respondent (Tr., 35-41).

On July 6, 1954, the following entry (the only "judgment" ever formalized) was made in the Civil Docket by the clerk of the Federal District Court (Tr., p. 42):

"[Title of District Court and Cause.]

CIVIL DOCKET

Date Filings—Proceedings

* * *

July 6, 1954, 6:00 p.m. Enter judgment for the plaintiff Audra H. Palmer against defendant State Farm Mutual Automobile Insurance Company, a corporation, in the sum of $10,000.00, together with interest thereon at the rate of six per cent per annum from January 18, 1951, until paid, together with her costs herein incurred."

* * *

On July 15, 1954, Appellant filed a motion for new trial and a Motion to Amend Findings (Tr., pp. 43-46).

On August 27, 1954, the following Order was filed and docketed (Tr. p. 46):

"[Title of District Court and Cause.]

ORDER

Defendant's motions for new trial and to amend findings are denied.

Dated: August 24, 1954, at Portland, Oregon.

/s/ Dave W. Ling,
U. S. District Judge.

[Endorsed]: Filed and docketed August 27, 1954."

On September 17, 1954, Appellant caused the following document to be filed with the Clerk of the District Court (Tr. pp. 48-49):

"[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company, insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein.

Dated this 17th day of September, 1954.

Scoville & Linton,

By /s/ Walter Linton,

Attorneys for Defendant, State Farm Mutual Automobile Insurance Company, a Corporation.

[Endorsed]: Filed September 17, 1954."

The Transcript of Record was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on October 25, 1954 (Tr., p. 346), and the Mo-

tion to Dismiss was filed by Respondent on January 19, 1955. The appeal was ordered dismissed by the Judgment entered March 24, 1955 (See Appendix B).

VI.

REASONS FOR GRANTING WRIT.

(a) The decision of the Court of Appeals conflicts with the decision of this Court in *United States v. Ellicott* (1912) 223 U.S. 524.

(b) The decision of the Court of Appeals conflicts with the decisions of the Courts of Appeals for the Fifth Circuit, the Seventh Circuit and the District of Columbia.

(c) The decision of the Court of Appeals runs counter to the letter and spirit of Rules 61 and 73(b), Federal Rules of Civil Procedure, and section 2111 of Title 28, United States Code, and to the rulings of this Court in *Hoiness v. United States* (1948) 335 U.S. 297 and *United States v. Arizona* (1953) 346 U.S. 907, in which this Court reversed orders of the Court of Appeals for the Ninth Circuit by which appeals had been dismissed without a hearing on the merits because of mere formal objections to the notice of appeal.

(d) This Court's power of supervision should be exercised to determine whether the form of notice of appeal here involved was sufficient, as held by this Court and by the Courts of Appeals for the Fifth and Seventh Circuits and the District of Columbia, or

insufficient, as held by the United States Court of Appeals for the Ninth Circuit in the instant case.

VII.

ARGUMENT.

I.

THE NOTICE OF APPEAL, EVEN THOUGH IT REFERRED TO THE DATE ON WHICH THE MOTION FOR A NEW TRIAL WAS DENIED, WAS SUFFICIENT TO INVOKE THE APPELLATE JURISDICTION OF THE COURT OF APPEALS TO REVIEW THE FINAL JUDGMENT ENTERED IN THIS CASE.

The sole question in this case is not whether the order of August 24, 1954, was an appealable order as such, but whether the Notice of Appeal filed by the Appellant was sufficient in form to invoke the appellate jurisdiction of the Court of Appeals to review the final judgment in this case.

Rule 73(b) of the Federal Rules of Civil Procedure (quoted above) does not prescribe any particular form for the notice. It merely says, "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken * * *"

The Notice of Appeal filed by Appellant in this case complies (we submit) with the provisions of Rule 73(b).

There was only one final judgment. It awarded the plaintiff (Respondent here) the sum of $10,000, together with interest thereon at the rate of 6% per

annum from January 18, 1951, together with her costs. The terms of that judgment were embraced in the entry in the Civil Docket (Tr., p. 42), and they were set out with particularity in the Notice of Appeal filed by Appellant (Tr., pp. 48-49). We cannot believe that the Notice of Appeal was ineffective because it referred also to the date on which the order denying the motion for a new trial was entered.

A notice of appeal in substantially the same form was held sufficient by this Court in *United States v. Ellicott* (1912) 223 U.S. 524. In that case the final judgment was entered against the United States on *May 18, 1908*; the United States filed a motion for new trial which was overruled on *January 4, 1909*; various other motions were then made and ruled upon and on February 25, 1909, the United States gave notice of appeal and in its notice of appeal specified that it was appealing *"from the judgment rendered in the above-entitled cause on the 4th day of January, 1909,"* which was the date of the order denying motion for new trial.

The appellee filed a motion to dismiss the appeal on the ground that it was not from a final judgment "but was merely from the order overruling the motion for a new trial." This Court summarily denied the motion to dismiss, stating "The motion is without merit. The general rule governing the subject of prosecuting error or taking appeals from final judgments or decrees * * * treats a judgment or decree properly entered in the cause as not final for the purposes of appeal until a motion for a new trial or a petition for

rehearing * * * has been disposed of; and the time for appeal begins to run from the date of such disposition."

Numerous cases are in accord:

Wilson v. So. Rwy. (C.C.A. 5, 1945) 147 Fed. (2d) 165:

The judgment was entered April 27, 1944. A motion for a new trial was denied by order dated June 10, 1944. Thereafter, the appellant filed a notice of appeal "from the final judgment entered in this action on June 10, 1944." In denying the motion to dismiss, the Court of Appeals for the Fifth Circuit stated:

> "it is clear that the notice of appeal was intended to obtain a review of the judgment of April 27, 1944, which was the only appealable judgment entered in the cause. Therefore, we hold that the notice was sufficient to perfect an appeal to this Court from the judgment of April 27, 1944."

Atlantic Coast Line R. Co. v. Mims (C.C.A. 5, 1952) 199 Fed. (2d) 582:

A motion for new trial was denied. The defendant gave notice of appeal "from the judgment overruling its motion for new trial." In denying the motion to dismiss, the Court stated:

> "While we agree with appellees that an appeal will not lie from an order overruling a motion for new trial, we agree with appellant that, though the order appealed from was misnamed, it clearly enough appears from the record as a whole that the intent was to appeal from the judgment and that that intent should be given effect."

Wetherbee v. Elgin Etc. Co. (C.C.A. 7, 1953) 204 Fed. (2d) 755:

The judgment appealed from was entered in January, 1952. The motion for new trial was denied March 21, 1952. The notice of appeal recited that appellant appeals "from the judgment entered in this action" on March 21, 1952. In denying the motion to dismiss, the Court of Appeals for the Seventh Circuit stated:

> "Under the circumstances we feel that appellee was not misled or prejudiced in any way. The mistake as to the date of the entry of the judgment appealed from was immaterial."

Sobel v. Diatz (U.S. Ct. App., Dist. of Col., 1951) 189 Fed. (2d) 26:

A rehearing had been denied by the trial Court on November 23. The notice of appeal recited "that the appeal is from the order of the 23rd day of November." In denying a motion to dismiss, the Court of Appeals for the District of Columbia said:

> "it is obvious that the appeal was intended to be from the order granting judgment * * * Under these circumstances we may treat the notice as an appeal from the judgment."

See also:

Safeway Stores v. Coe (U.S. Ct. App., Dist. of Col., 1943) 136 Fed. (2d) 771.

In the discussion just set forth, we have shown that this Court as well as the Courts of Appeal of the Fifth and Seventh Circuits and of the District of Columbia hold that a notice of appeal which refers only to the date on which a motion for new trial was denied is sufficient to invoke the appellate jurisdiction of the court.

As above indicated, the judgment of the United States Court of Appeals for the Ninth Circuit in the instant case is contrary to the position taken by this Court and by numerous other United States courts.

As a matter of fact, the Notice of Appeal filed in this case went much further than the notices of appeal which were held sufficient in the cases above referred to, because our notice actually set out the terms of the judgment complained of.

Had our Notice of Appeal merely eliminated any reference to the order of August 24, 1954 (that is, had the words commencing with "order" and ending with "grants" been eliminated from the Notice of Appeal), even the most highly technical application of the rules invoked by appellee could not have rendered our Notice of Appeal subject to the unfounded objections here urged.

That technicalities should not be used as a basis for dismissing an appeal without a hearing on the merits appears well established by the doctrines which we now discuss.

II.

THE DEFECT (IF ANY) IN THE NOTICE OF APPEAL RAN ONLY TO FORM AND SHOULD HAVE BEEN DISREGARDED IN ACCORDANCE WITH THE ENLIGHTENED POLICY EXPRESSED IN THE FEDERAL RULES OF CIVIL PROCEDURE AND IN THE JUDICIAL CODE AND THE DECISIONS OF THIS COURT WHICH HAVE CONSTRUED THEM.

Eliminating any reference to the order of August 24, 1954, our notice of appeal would read as follows:

> "Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the * * * judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

We respectfully submit that adding to the above a reference to the order of August 24—or designating the order of August 24 instead of the order of July 6—is not such a departure from the rules as warrants the drastic action of dismissing an appeal without hearing it on the merits.

As stated by Judge Denman in *Cutting v. Bullerdick,* (C.C.A. 9, 1949) 178 Fed. (2d) 774, "The rule of strict construction does not apply to the acquiring of jurisdiction by an appellate court. On the contrary, the steps taken for an appeal are to be liberally construed as appears from the cases cited * * *"

As stated in 13 *Cyclopedia of Federal Procedure,* page 473, Sec. 60.94:

> "If the notice is sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment."

Mistakes in dates have never been held to nullify notices of appeal otherwise valid. See *Porter v. Borden's Dairy* (C.C.A. 9, 1946) 156 Fed. (2d) 798, and *Shannon v. Retail Clerks etc. Assn.* (C.C.A. 7, 1942) 128 Fed. (2d) 553.

The liberal doctrines referred to in the authorities just cited are embodied in Rule 61, Federal Rules of Civil Procedure, and United States Code, Title 28, sec. 2111, which we have quoted above.

In *Hoiness v. United States* (1948) 335 U.S. 297, this Court reversed a judgment of the Court of Appeals for the Ninth Circuit by which an appeal was dismissed without a hearing on the merits because of a claimed deficiency in the notice of appeal. Two orders were involved, one appealable and one not appealable. The petition for appeal referred solely to the order which was not appealable, but this Court held: "that defect was of such a technical nature that the Court of Appeals should have disregarded it in accordance with the policy expressed by Congress in * * * section 777 of Title 28, United States Code."

Only five years later, this Court again had occasion in a memorandum opinion to reverse a judgment of the Court of Appeals for the Ninth Circuit by which an appeal was dismissed on the merits because of claimed defects in the notice of appeal. See *United States v. Arizona* (1953) 346 U.S. 907.

In seeking to avoid or distinguish the rule of the *Hoiness* case, the Court of Appeals in its opinion in the instant case pointed out that section 777 "does not apply to this case because the action was not pending prior to the repeal of that section."

It is quite true that section 777 has been repealed, but we suggest that the Court of Appeals has overlooked the fact that the provisions of section 777 have been embodied in Rule 61 of the Federal Rules of Civil Procedure.

In this connection it is to be noted that the Advisory Committee on Rules in its comment on Rule 61 stated (14 Cyc. Fed. Proc., Sec. 6855) that it was:

> "A combination of U.S.C.A., Title 28, sec. 2111, former sec. 391 (New Trials; harmless error) and former sec. 777 (Defects of form, amendments) with modifications. See McCandless v. United States 1936, 56 S. Ct. 764, 298 U.S. 342, 80 L. Ed. 1205. Compare former Equity Rules 72 (Correction of Clerical Mistakes in Orders and Decrees); and last sentence of former Equity Rule 46 (Trial—Testimony Usually taken in Open Court —Rulings on Objections to Evidence). For the last sentence see the last sentence of former Equity Rule 19 (Amendments Generally)."

See also:

> *Crump v. Hill* (C.C.A. 5, 1939) 194 Fed. (2d) 36.

Furthermore, it is to be recalled that in the opinion of this Court in the *Hoiness* case the footnote referring to the repeal of section 777 ended with "and see Rules 1, 15, 61 and 81 Rules of Civil Procedure."

It is thus clear that section 777 lives on in Rule 61, Rules of Civil Procedure, and that the interests of justice and orderly procedure require that the order dismissing the appeal without a hearing on the merits be reversed.

We believe that the *Hoiness* case stands for the proposition that where the notice of appeal sufficiently apprises the appellee of the judgment from which appeal is taken, any objection running only to form must be disregarded. "No one was misled or injured."

(*Voehl v. Indemnity Insurance* Co. (1933) 288 U.S. 162 at 177.)

VIII.

CONCLUSION.

In conclusion, it is respectfully submitted that a writ of certiorari should issue in the instant case to review the judgment of the United States Court of Appeals for the Ninth Circuit to the end that the appeal may be heard on its merits.

Dated, San Francisco, California,
October 31, 1955.

Respectfully submitted,

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SCOVILLE & LINTON,
Attorneys for Petitioner.

(Appendices A and B Follow.)

Appendix A

OPINION.

United States Court of Appeals for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, *Appellant*, vs. AUDRA H. PALMER, *Appellee*.	No. 14,560 Mar. 24, 1955

Upon Appeal from the United States District Court for the District of Arizona.

On Appellee's Motion to Dismiss Appeal

Before: STEPHENS, FEE and CHAMBERS, Circuit Judges

JAMES ALGER FEE, Circuit Judge:

Plaintiff, according to the record, sustained personal injuries on January 17, 1948, as a result of operation of an automobile by one Nollner. She recovered a judgment on January 18, 1951, after trial, for $27,500.00 for damages against Nollner in the state court. The latter was insured by defendant to the extent of $10,000.00 only by a policy in force at the time plaintiff was injured. Plaintiff brought action in the United States District Court on the policy. Defendant

resisted on the ground that Nollner had not appeared at the original trial. The cause was tried in February, 1952. On October 22, 1953, a minute order was entered in favor of defendant, but, on consideration of the findings of fact, judgment for plaintiff entered July 6, 1954. Defendant filed a motion for new trial and to amend the findings, which the trial court denied August 24, 1954. The defendant filed notice of appeal from this order on September 17, 1954, insofar as it denied amendment of the findings and put the judgment in effect.

The appellee has moved to dismiss the appeal because it was not taken from a final judgment.

Appellant acquiesces in this statement but urges (1) that an intention to review the judgment on the merits can be ascertained from the notice, (2) that the notice was filed within time to perfect an appeal from the judgment, (3) that a motion was filed to amend the notice of appeal long after the time for filing thereof had lapsed, and (4) that, by the points and specifications of errors placed in the record after time of filing the notice had expired, sufficient definiteness was attained.

The filing of the notice of appeal goes to the jurisdiction. The third and fourth points cannot avail appellant. The fact that the notice of appeal was filed within the prescribed time is a condition precedent to any relief for appellant. The intention to ask review of the judgment might be inferred from the text of the notice. Appellant asks that it be so construed notwithstanding the notice definitely states the appeal is

taken "from the order entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company * * *."

In two cases in this circuit the Supreme Court directed appeals to be heard where the notice was defective in minor particulars. In the first,[1] there was an order which apparently entered judgment but directed the filing of findings of fact and conclusions of law. Thereafter, findings of fact, conclusions of law and final judgment were entered. The trial court allowed appeal from the latter, and all parties treated it as the "final order." The Supreme Court held that, whether the first or second order was final, the appeal was timely as to either and the matter was not defective. In the second case,[2] the appeal was timely from the final order, but the appellant made the mistake of specifying the nonappealable phase in the notice. Here it was held the notice was sufficient.

It seems apparent the Supreme Court did not announce in either of these cases that an intermediate appellate court is required to grant a hearing as of right to a litigant irrespective of the timely filing of notice of appeal or a violation of other statutes or rules of court relating thereto.

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[1]Hoiness vs. United States, 335 U.S. 297, reversing 165 F.2d 504. It should be noted that the statute, 28 U.S.C. (1946 Ed.) § 777, does not apply to this case because the action was not pending prior to the repeal of that section.

[2]United States vs. State of Arizona, 346 U.S. 907, reversing 206 F.2d 159. The Rules of Civil Procedure do not affect this situation. No appeal lies unless taken from a "final decision."

No appeal lies from the order of August 24, which in its entirety reads:

> "Defendant's motions for new trial and to amend findings are denied."

This Court has treated an appeal from such an order as void[3] on jurisdictional grounds.[4] There is no public policy which demands a departure from this authority in the case at bar. Appeals are not of right, but of grace. The Supreme Court of the United States regularly denies certiorari where much more important considerations for the parties are involved.

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[3]Libby, McNeill & Libby vs. Alaska Industrial Board, 9 Cir., 215 F.2d 781. There it was said: "Appellant erroneously assumes that this 'minute order' denying its motion for a new trial is appealable as a 'final decision' under Section 1291 of Title 28 U.S. Code. An order denying a motion for a new trial is not the kind of 'final decision' contemplated by the statute. • • • The doctrine thus adopted is only an exemplification of the statutory limitation that jurisdiction does not attach unless appeal is taken from a 'final decision.' Most other courts follow a like rule. In many other situations this court has enforced the jurisdictional requirement that appeal is to be taken from a 'final decision' with meticulous and technical exactness. • • • The final decision in the instant action from which an appeal to this court might have been taken under Section 1291, supra, was the decree of January 2, 1953. No appeal from that decree was taken, hence this court is without jurisdiction of the purported appeal now before us. It must be, and, hereby is, dismissed." (page 782.)

[4]The only appealable judgment in the case at bar is the judgment of the court on July 6, 1954. The Courts of Appeal are without jurisdiction to review the decision of a District Court in the absence of an appeal from the judgment. In re McIntosh, 9 Cir., 95 F.2d 627; Armstrong vs. New LaPaz Gold Mining Co., 9 Cir., 107 F.2d 453, 454; United States vs. Tavares Construction Co., 9 Cir., 175 F.2d 379, 380; Agostino vs. Ellamar Packing Co., Inc., 9 Cir., 191 F.2d 576, 577; Bass vs. Baltimore & Ohio Terminal R. Co., 7 Cir., 142 F.2d 779, 780; Ford Motor Co. vs. Busam Motor Sales, Inc., 7 Cir., 185 F.2d 531, 533; Luckenbach S.S. Co. vs. United States, 272 U.S. 533.

This failure is jurisdictional. Whatever may have been the situation in other cases, no power is given this Court to construe the notice here.[5] The only "final decision" (28 U.S.C.A. § 129) which could have been appealed was the judgment of July 6, 1954. The only order specified on the notice of appeal was that order of August 24, 1954, which has been completely set out above and which is not appealable. Our former ruling is in point and is followed. Libby, McNeill & Libby vs. Alaska Industrial Board, 215 F.2d 781.

Motion to dismiss appeal granted.

(Endorsed:) Opinion. Filed Mar. 24, 1955.
Paul P. O'Brien, Clerk.

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[5]Since the whole text of the order appealed from is set out, it is not necessary for the Court to give any effect to the words of the notice, which apparently state what the author conceived to be the legal effect of the minute order "insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

Appendix B

JUDGMENT.

United States Court of Appeals for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, *Appellant*, vs. AUDRA H. PALMER, *Appellee*.	No. 14,560

JUDGMENT

Appeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and on motion of Appellee for dismissal of the appeal herein, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is dismissed.

(ENDORSED) Judgment

Filed and Entered: March 24, 1955

PAUL P. O'BRIEN, Clerk.

DEC 29 1955
HAROLD B. WILLEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1955

No. 504

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation,
Petitioner,

vs.

AUDRA H. PALMER,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

		Page
I.	Opinion Below	1
II.	Jurisdiction	1
III.	Questions Presented For Review	2
IV.	Statutes and Rules Involved	2
V.	Statement of Facts	4
VI.	Reasons for Denying Writ	5
VII.	Argument	6

I. Jurisdiction of Court of Appeals is statutory; and such Court may review only judgments, decrees or orders of a Court lawfully brought before it for review by notice of appeal from a final decision or order from which an appeal may be taken. Petitioner gave notice of appeal from the order of the District Court denying a motion for new trial, which is not an appealable order 6

II. Notice of appeal from an order denying a motion for new trial and to amend findings, which order is correctly identified by the date thereof in the notice, is not an appeal taken from a final decision. The decisions of this Court, the Fifth and Seventh Courts of Appeals and the Court of Appeals for the District of Columbia are not in conflict with the decision of the Court below.... 8

III. There is neither a mistake in date nor mere defect in form in Petitioner's Notice of Appeal.... 11

IV. Neither the enlightened policy expressed in the Federal Rules of Civil Procedure, nor repealed Sec. 777 of former Title 28, *United States Code*, as carried forward in present Sec. 2111 of the Judicial Code, can confer jurisdiction on Court of Appeals or amend the jurisdictional requisites of Secs. 1291 and 2106 of the Judicial Code or be invoked to supply jurisdictional defects..... 12

INDEX — (Cont.)

Page

V. The rulings of this Court in the Hoiness case and the Arizona case are not contrary to the ruling of the Court below 15

VI. The real issue before this Court is one of jurisdiction of the Court of Appeals and not one of discretion 17

TABLE OF AUTHORITIES CITED

CASES

	Page
Agostino vs. Ellamar Packing Co., Inc., (C.A. 9) 191 Fed.(2d) 576	6
Armstrong vs. New LaPaz Gold Mining Co. (C.C.A. 9) 107 Fed.(2d) 453	6
Atlantic Coast Line R. Co. vs. Mims (C.C.A. 5) 199 Fed.(2d) 582	9, 10
Audi Vision Inc. vs. R.C.A. Mfg. Co. Inc., 136 Fed.(2d) 621	13, 16
Bass vs. Baltimore & O. Terminal R. Co. (C.C.A. 7) 142 Fed.(2d) 779	6
Board of Governors of Federal Reserve System vs. Trans-America Corp. (C.A. 9), 184 Fed.(2d) 311	13, 16
Cobbledick vs. United States, 60 S. Ct. 540, 309 U.S. 323, 84 L. Ed. 783	6
Cohen vs. Beneficial Industrial Loan Corp., 69 S. Ct. 1221, 337 U.S. 541, 93 L. Ed. 1528	6
Ford Motor Co. vs. Busam Motor Sales, Inc. (C.A. 7) 185 Fed.(2d) 531	7
Hoiness vs. United States, 335 U.S. 297, 93 L. Ed. 16	5, 15, 16
In Re Griggs, 233 Fed. 243	14
In Re McIntosh (C.C.A. 9), 95 Fed.(2d) 627	6
Leonard vs. Socony-Vacuum Oil Co., 130 Fed.(2d) 535	13, 16
Libby, McNeill & Libby vs. Alaska Industrial Board (C.A. 9) 215 Fed.(2d) 781	6, 7
Luckenbach S.S. Co. vs. United States, 47 S. Ct. 186, 272 U.S. 533, 71 L. Ed. 394	7

TABLE OF AUTHORITIES CITED — (Cont.)

	P
Mookini et al vs. U.S., 303 U.S. 584, 82 L. Ed. 748	13,
Ohl and Company vs. Smith Iron Works, 288 U.S. 170, 77 L. Ed. 681	
Porter vs. Borden's Dairy Delivery Co., 156 Fed.(2d) 798	
Safeway Stores vs. Coe, 136 Fed.(2d) 771	9,
Shannon vs. Retail Clerks Int. Protective Ass'n., 128 Fed.(2d) 553	
Sobel vs. Diatz, 189 Fed.(2d) 26.	
State Farm Mutual Insurance Company vs. Audra H. Palmer, 225 Fed.(2d) 876	1, 5,
Uinted States vs. Arizona, 346 U.S. 907, 98 L. Ed. 405	5, 15,
United States vs. Ellicott, 223 U.S. 524, 56 L. Ed. 535	5, 8
United States vs. Sherwood, 312 U.S. 584, 85 L. Ed. 1058	13,
United States vs. Tavares Const. Co. (C.A. 9) 175 Fed. (2d) 379	
Voehl vs. Indemnity Insurance Co., 288 U.S. 162	
Wetherbee vs. Elgin, etc., Co. (C.C.A. 7), 204 Fed(2d) 755	
Wilson vs. Southern Ry. Co. (C.C.A. 5), 147 Fed.(2d) 165	

TABLE OF AUTHORITIES CITED — (Cont.)

AUTHORITY	Page
1 Federal Practice and Procedure, Barron & Holtzhoff, 1955 Pocket Part, Sec. 121, p. 106	13
CODES	
United States Code, Title 28, Section 777 (repealed June 25, 1948, 62 Stat. 992, c. 646 § 39)	2, 12, 13, 14, 16
United States Code, Title 28, 1254(1)	2
United States Code, Title 28, 1291	2, 6, 10, 12, 14, 18
United States Code, Title 28, 1292	6, 18
United States Code, Title 28, 2106	2, 6, 10, 12, 14, 18
United States Code, Title 28, 2111	2, 3, 5, 12, 14
United States Code, Title 28, 2072	3
RULES	
Federal Rules of Civil Procedure:	2, 5, 12, 13, 14, 16
Rule 1	3, 13, 16
Rule 61	5, 12, 13, 14, 16
Order of Supreme Court of United States dated June 3, 1935 appointing Advisory Committee to formulate Federal Rules of Civil Procedure	3

In the Supreme Court

OF THE

United States

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I

OPINION BELOW

The opinion of the Court of Appeals is reported in the Federal Reporter system at 225 Fed.(2d) 876.

II

JURISDICTION

The judgment of the Court of Appeals was filed and entered March 24, 1955. (See Appendix B, Petition for Writ of Cer-

tiorari.) A petition for rehearing was denied September 23, 1955. (Tr. 357, 358). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., 1254(1).

III

QUESTIONS PRESENTED FOR REVIEW

Is an appeal taken from an order of the court denying a motion for new trial and a motion to amend findings, an appeal from a final decision under United States Code, Title 28, Sec. 1291?

Is the jurisdiction of the Court of Appeals to be determined from the intention existing in the mind of the drafter of a notice of appeal where the notice states that the appeal is from the order denying a motion for new trial?

Can a statute which has been repealed by Congress (28 *United States Code*, Sec. 777, repealed June 25, 1948, 62 Stat. 992, c.646, Sec. 39), or *United States Code*, Title 28, Sec. 2111, or the *Federal Rules of Civil Procedure* be relied upon to invoke the jurisdiction of the Court of Appeals?

IV

STATUTES AND RULES INVOLVED

United States Code, Title 28, Sec. 1291, Final Decision of District Courts:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *"

United States Code, Title 28, Sec. 2106, Determination:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court *lawfully brought before it for review*, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or re-

quire such further proceedings to be had as may be just under the circumstances."*

United States Code, Title 28, Sec. 2111, Harmless Error:

> "*On the hearing* of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

United States Code, Title 28, Sec. 2072, Rules of Civil Procedure for District Courts:

> "The Supreme Court shall have the *power to prescribe,* by general rules, the forms of process, writs, pleadings, and motions, and *the practice and procedure of the district courts of the United States* and of the District Court for the territory of Alaska in civil actions. * * *"

Order of Supreme Court of United States dated June 3, 1935, appointing Advisory Committee to formulate Federal Rules of Civil Procedure:

> "It is ordered:
>
> 1. Pursuant to Section 2 of the Act of June 19, 1934, c.651, 48 Stat. 1064 (28 U.S.C.A. §723c) the Court will undertake the preparation of a unified system of general rules for cases in equity and actions at law *in the District Courts of the United States* and in the Supreme Court of the District of Columbia, so as to secure one form of civil action and procedure for both classes of cases, while maintaining inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights."

Federal Rules of Civil Procedure, Rule 1. Scope of Rules:

> "These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy,

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*Wherever emphasis appears in a statute, rule, or quotation from an opinion in this brief, the emphasis was supplied by the writer of the brief.

and inexpensive determination of every action. As amended, 1949.

V

STATEMENT OF FACTS

July 6, 1954, judgment was entered (Tr. 42) for the Respondent, Audra H. Palmer, and against the Petitioner, State Farm Mutual Automobile Insurance Company, in the sum of $10,000.00 together with interest and costs.

July 15, 1954, Petitioner filed a motion for new trial and a motion to amend findings (Tr. 43-46).

August 24, 1954, the Court made its order denying defendant's motion for new trial and to amend findings in the following language (Tr. 46):

> "ORDER Defendant's motions for new trial and to amend findings are denied."

September 17, 1954, Petitioner filed the following notice of appeal with the Clerk of the District Court. (Tr. 48-49):

"NOTICE OF APPEAL

> "Notice Is Hereby Given that State Farm Mutual Automobile Insurance Company, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the *order* entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company, insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

Respondent filed a motion to dismiss the appeal in the Court of Appeals for want of jurisdiction in that Appellant had not filed notice of appeal from the final decision of the District Court.

March 24, 1955, The judgment of the Court of Appeals dismissing the appeal was filed and entered (See Appendix B, Petition for Writ of Certiorari.) (Tr. 357)

September 23, 1955, Petition for Re-hearing was denied. (Tr. 358)

VI

REASONS FOR DENYING WRIT

(a) The decision of the Court of Appeals does not conflict with the decision of this Court in *United States vs. Ellicott,* 223 U.S. 524, 56 L.Ed. 535.

(b) The decision of the Court of Appeals does not conflict with the decision of the Courts of Appeals for the Fifth Circuit, the Seventh Circuit and the District of Columbia as claimed in Petitioner's brief.

(c) The decision of the Court of Appeals is not and cannot be controlled by the Federal Rules of Civil Procedure, including Rule 61, for the reason that such Rules govern only the procedure in District Courts. They do not apply to Appellate Courts or enlarge the statutory jurisdiction of Appellate Courts. Nor is the decision of the Court of Appeals contrary to *United States Code,* Title 28, Sec. 2111, or the decisions of this Court in *Hoiness vs. United States,* 335 U.S. 297, 93 L.Ed. 16, and *United States vs. Arizona,* 346 U.S. 907, 98 L.Ed. 405.

(d) There is no need for this Court to exercise its power of supervision in the instant case for the record plainly shows that Petitioner failed to appeal from the final judgment in the case; and Petitioner so acknowledged before the Court of Appeals, as appears from the opinion of that Court. 225 Fed. (2d) 876, 877.

VII

ARGUMENT

I

Jurisdiction of Court of Appeals is statutory; and such Court may review only judgments, decrees or orders of a Court lawfully brought before it for review by notice of appeal from a final decision or order from which an appeal may be taken. Petitioner gave notice of appeal from the order of the District Court denying a motion for new trial, which is not an appealable order.

With the exception of the situations expressly provided for by *United States Code,* Title 28, Sec. 1292, the Court of Appeals has jurisdiction to review only *"final"* decisions of the District Court *"lawfully brought before it for review."*

United States Code, Title 28, Secs. 1291, 2106.

Cobbledick vs. United States, 60 S.Ct. 540, 309 U.S. 323, 84 L.Ed. 783, 785.

Cohen vs. Beneficial Industrial Loan Corp., 69 S. Ct. 1221, 337 U.S. 541, 93 L.Ed. 1528, 1536.

An order of the District Court denying a motion for new trial and to amend findings is not a final decision. The Court of Appeals is without jurisdiction to review the decision of the District Court in the absence of an appeal from the judgment.

In Re McIntosh (C.C.A. 9), 95 Fed. (2d) 627

Armstrong vs. New LaPaz Gold Mining Co., (C.C.A. 9), 107 Fed. (2d) 453, 454

United States vs. Tavares Const. Co. (C.A. 9), 175 Fed. (2d) 379, 380

Agostino vs. Ellamar Packing Co., Inc. (C.A. 9), 191 Fed. (2d) 576, 577

Libby, McNeill & Libby vs. Alaska Industrial Board (C.A. 9), 215 Fed. (2d) 781, 782

Bass vs. Baltimore & O. Terminal R. Co. (C.C.A. 7), 142 Fed. (2d) 779, 780

Ford Motor Co. vs. Busam Motor Sales, Inc., (C.A. 7), 185 Fed. (2d) 531, 533

Luckenbach S. S. Co. vs. United States, 47 S.Ct. 186, 272 U.S. 533, 71 L.Ed. 394, 395.

The only decision of the District Court appealed from herein is the order of August 24, 1954, which denied the motion for new trial and to amend findings. Clearly that is not an appealable order under the authorities above cited.

In *Luckenbach S. S. Co. vs. United States*, supra, 71 L.Ed. 394, 395, where a situation almost identical with the one here presented was involved, this Court held:

> "The judgment was entered April 28, 1924. The claimant seasonably moved for a new trial and included in the motion a request for amended findings. While that motion was pending the claimant, becoming apprehensive lest the time allowed for an appeal might be running, filed with the clerk an application for an appeal from the judgment. Thereafter the motion for a new trial, with the request for amended findings, was denied, and the application for an appeal was then brought to the court's attention and allowed. A little later the claimant applied for an appeal from the order refusing a new trial and amended findings and the court allowed that appeal.
>
> "Counsel for the United States insist that neither appeal was effective. Plainly the second was not, for it was from an order which was not appealable. But the first was from the judgment and we think it was well taken."

Under similar circumstances in *Libby, McNeill & Libby vs. Alaska Industrial Board*, supra, 215 Fed. (2d) 781, 782, the Court held:

> "Appellant erroneously assumes that this 'minute order' denying its motion for a new trial is appealable as a 'final decision' under Section 1291 of Title 28, U.S. Code. An order denying a motion for a new trial is not the kind of 'final decision' contemplated by the statute. (Citing Cases). The doctrine thus adopted is only an exemplification of the statutory limitation that jurisdiction does not attach unless ap-

peal is taken from a 'final decision.' Most other courts follow a like rule. In many other situations this court has enforced the jurisdictional requirement that appeal is to be taken from a 'final decision' with meticulous and technical exactness. (Citing Cases).

"The final decision in the instant action from which an appeal to this court might have been taken under Section 1291, supra, was the decree of January 2, 1953. No appeal from that decree was taken, hence this court is without jurisdiction of the purported appeal now before us. It must be, and, hereby is, dismissed."

The only final decision of the District Court in this case from which an appeal might have been taken was the judgment entered in July 6, 1954. No appeal from that judgment was taken; therefore the Court of Appeals for the Ninth Circuit was without jurisdiction of the purported appeal and properly dismissed the appeal.

II

Notice of appeal from an order denying a motion for new trial and to amend findings, which order is correctly identified by the date thereof in the notice, is not an appeal taken from a final decision. The decisions of this Court, the Fifth and Seventh Courts of Appeals and the Court of Appeals for the District of Columbia are not in conflict with the decision of the Court below.

Respondent will consider each of the cases cited by Petitioner in Part I of its Argument and demonstrate that the cases do not support Petitioner's argument.

In *United States vs. Ellicott*, 223 U.S. 524, 56 L.Ed. 535, 543, final judgment was entered against the United States on May 18, 1908. A motion for new trial was denied January 4, 1909. On February 25, 1909 the United States gave notice of appeal "from the *judgment* rendered in the above-entitled cause on the 4th day of January, 1909." The appeal was taken from the *judgment* entered in the case. The notice of appeal mistakenly referred to the

date on which the motion for new trial was denied rather than the date on which the judgment was entered. This Court properly held that it would disregard the mistaken date.

Petitioner also cites the case of *Wilson vs. Southern Ry. Co.* (C.C.A. 5), 147 Fed.(2d) 165, in which judgment was entered April 27, 1944. Motion for new trial was denied June 10, 1944. Notice of appeal was filed "from the final *judgment* entered in this action on June 10, 1944." Motion to dismiss the appeal was denied, the Court holding that an appeal was taken from the final judgment notwithstanding the date upon which the judgment was entered was mistakenly designated in the notice of appeal.

In *Atlantic Coast Line R. Co., vs. Mims* (C.C.A. 5), 199 Fed. (2d) 582, defendant gave notice of appeal "from the *judgment* overruling its motion for new trial." Motion to dismiss the appeal was denied on the ground that there was an appeal from the judgment although the judgment appealed from was misnamed.

In *Wetherbee vs. Elgin, etc. Co.* (C.C.A. 7), 204 Fed.(2d) 755, judgment was entered in January, 1952. The motion for new trial was denied March 21, 1952. Appellant gave notice of appeal "from the *judgment* entered in this action" on March 21, 1952. The Court ruled, as in the other cases, supra, that the mistake as to the date of the entry of the judgment appealed from was immaterial.

The same ruling was made by the U. S. Court of Appeals for the District of Columbia in the case of *Safeway Stores vs. Coe*, 136 Fed.(2d) 771, in which the notice of appeal recited that Appellant "hereby appeals * * * from the *judgment* of this Court entered the 17th day of January, 1942 * * *" which was the date on which the order denying a motion for re-hearing was made.

In *U. S. vs. Ellicott, Wilson vs. Southern Ry. Co., Wetherbee vs. Elgin, etc. Co.* and *Safeway Stores vs. Coe*, supra, the Appellant gave notice of appeal from the *judgment* in the action which was the final decision. In each of these cases the notice of appeal incorrectly specified the date on which the judgment was entered,

giving by mistake the date on which a non-appealable order was entered. In *Atlantic Coast Line R. Co. vs. Mims,* supra, there was no mistake as to date, but the appeal was from the *judgment* — not, as here, from the *order* denying the motion for a new trial. The only principle which can be drawn from these cases is that where the notice of appeal designates that the appeal is from the *judgment* the Court will consider as immaterial and disregard mistakes in specifying the date on which the *judgment* was entered. Accordingly, the cases cited by Appellant do not support its argument at page 13 of its Petition For Writ of Certiorari where it incorrectly draws the following conclusion from said cases:

> "In the discussion just set forth, we have shown that this Court as well as the Courts of Appeal of the Fifth and Seventh Circuits and of the District of Columbia hold that *a notice of appeal which refers only to the date on which a motion for new trial was denied* is sufficient to invoke the appellate jurisdiction of the court."

If Petitioner's conclusion is valid, then indeed the Courts by judicial interpretation have amended *United States Code,* Title 28, Secs. 1291 and 2106. Under no circumstances can a notice of appeal "which refers only to the date on which a motion for new trial was denied" be construed as notice of appeal from a final judgment. Petitioner has not cited a single case which supports its conclusion.

The decision in *Sobel vs. Diatz,* 189 Fed(2d) 26, is not pertinent. That case was tried in the Municipal Court of the District of Columbia and was taken first on appeal to the Municipal Court of Appeals and from that court to the United States Court of Appeals for the District of Columbia. The latter Court accepted the decision of the Municipal Court of Appeals, treating the notice as an appeal from the judgment. The only reliable case disclosing the position of the Court of Appeals for the District of Columbia is the case of *Safeway Stores vs. Coe,* supra, in which that Court disregarded a mistake in the date of entry of judgment.

III

There is neither a mistake in date nor mere defect in form in Petitioner's Notice of Appeal.

At the time of the oral argument on Respondent's motion to dismiss the appeal in the Court below, Petitioner acknowledged that it had not taken an appeal from the final judgment. It moved the Court to allow an amendment of its notice of appeal (See Appendix, this brief; Tr. 361, 362), and argued the matters referred to in the opinion of the Court of Appeals, 225 Fed(2d) 876, 877, as follows:

> "The appellee has moved to dismiss the appeal because it was not taken from a final judgment.
>
> "Appellant acquiesces in this statement but urges (1) that an intention to review the judgment on the merits can be ascertained from the notice, (2) that the notice was filed within time to perfect an appeal from the judgment, (3) that a motion was filed to amend the notice of appeal long after the time for filing thereof had lapsed, and (4) that, by the points and specifications of errors placed in the record after time of filing the notice had expired, sufficient definiteness was attained."

Having been unsuccessful in that approach in the Court of Appeals Petitioner now changes its position and in this Court talks about "mistakes in dates" in its notice of appeal (Petition For Writ of Certiorari, Page 15) and of only a defect in form in its Notice of Appeal. A casual examination of the notice of appeal filed by Petitioner discloses that there was no mistake in dates and no defect in form in its notice which specified that Appellant

> "* * * hereby appeals to the United States Court of Appeals for the Ninth Circuit from the *order* entered in the above-entitled and numbered cause on August 24, 1954, in favor of Plaintiff, Audra H. Palmer, and against the Defendant, State Farm Mutual Automobile Insurance Company, insofar as said order of August 24, 1954, denies Defendant's motions for new trial and denies Defendant's motions to

amend findings and grants judgment to Plaintiff and against the Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951, and together with Plaintiff's costs incurred therein."

The fact that the Notice twice specifies the order of August 24, 1954 can leave no doubt but that it was the only order appealed from. The description of that order as denying Defendant's motion for new trial and denying Defendant's motion to amend findings definitely and unmistakenly ties it to the order of August 24. It is apparent that the drafter of the notice misconstrued the legal effect of that order as granting judgment. The order of August 24 did not grant judgment. But the date specified in the notice of appeal was *not a mistake.* It correctly identifies the only order appealed from.

IV

Neither the enlightened policy expressed in the Federal Rules of Civil Procedure, nor repealed Sec. 777 of former Title 28, *United States Code,* as carried forward in present Sec. 2111 of the Judicial Code, can confer jurisdiction on Court of Appeals or amend the jurisdictional requisites of Secs. 1291 and 2106 of the Judicial Code or be invoked to supply jurisdictional defects.

At Page 15 of its brief Petitioner argues that the enlightened policy expressed in the *Federal Rules of Civil Procedure* (Rule 61) and the Judicial Code (*United States Code,* Title 28, Sec. 2111) constitutes ground for disregarding the fact that Petitioner did not give notice of appeal from the judgment and for construing its notice as being sufficient to invoke the appellate jurisdiction of the Court below. In this argument it claims that repealed Sec. 777 of former Title 28, *United States Code,* has been carried forward and embodied in Rule 61 of the *Federal Rules of Civil Procedure* and Sec. 2111, *United States Code,* Title 28.

This Court has recognized that the *Federal Rules of Civil Procedure* apply only to United States District Courts. *Mookini et al vs. U. S.,* 303 U. S. 201, 82 L.Ed. 748.

This Court also has recognized that the authority to establish the *Federal Rules of Civil Procedure* did not authorize this Court to increase or enlarge the jurisdiction of Federal Courts. In *United States vs. Sherwood,* 312 U. S. 584, 85 L.Ed. 1058, 1063, this Court said:

> "* * * An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction and the Act of June 19, 1934, 48 Stat. at L. 1064, chap. 651, 28 U.S.C.A., § 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

Accordingly, the *Federal Rules of Civil Procedure* do not affect the jurisdiction of or deal with the powers of appellate courts. These rules do not apply to Courts of Appeal.

> *Federal Rules of Civil Procedure,* Rule 1;
>
> *Audi Vision Inc., vs. R.C.A. Mfg. Co., Inc.,* 136 Fed. (2d) 621;
>
> 1 *Federal Practice and Procedure,* Barron and Holtzhoff, 1955 Pocket Part, Sec. 121, p. 106;
>
> *Board of Governors of Federal Reserve System vs. Trans-America Corp.,* (C.A. 9), 184 Fed.(2d) 311, 317.

The Rules have worked no modification of the provisions of the Judicial Code that Courts of Appeal have appellate jurisdiction to review only final decisions of District Courts. *Leonard vs. Socony-Vacuum Oil Co.,* 130 Fed(2d) 535.

The Court below did not overlook the fact (as contended by Petitioner at page 16 of its Petition) that repealed Sec. 777 of the former Judicial Code may have been embodied, inpart, in Rule 61 of the *Federal Rules of Civil Procedure.* See opinion

of the Court of Appeals, 225 Fed(2d) 876, 877, in footnote No. 2 in which the Court correctly said:

> "* * * The Rules of Cicil Procedure, 28 U.S.C.A., do not affect this situation. No appeal lies unless taken from a 'final decision'."

Accordingly, even if repealed Sec. 777 of former Title 28, *United States Code,* was carried forward, in part, in Rule 61 of the *Federal Rules of Civil Procedure,* the enlightened policy therein expressed cannot be invoked to add something to Petitioner's notice of appeal which does not exist therein since the *Rules of Civil Procedure* have no application to Courts of Appeal; they do not affect or modify the jurisdictional requirements embodied in Sec. 1291 of the Judicial Code.

Petitioner argues that repealed Sec. 777 of former Title 28, *United States Code,* was carried forward in present Sec. 2111, *United States Code,* Title 28, entitled "Harmless Error" which we have quoted, supra. The present Sec. 2111 can have application only where the Court of Appeals has jurisdiction to hear the case. The Eighth Circuit Court held that repealed Sec. 777 of former Title 28, *United States Code,* could not be employed to supply a lack of jurisdiction.

In Re Griggs, 233 Fed. 243.

United States Code, Title 28, Sec. 1291, is supplemented by Sec. 2106, Title 28, *United States Code,* which provides that the Supreme Court and the courts of appellate jurisdiction may rule upon judgments, decrees or orders of a court "lawfully brought before it for review". Accordingly, Sec. 2111, supra, does not apply to a case unless and until it is determined that the Court of Appeals has jurisdiction of the case. The alleged liberality of doctrine referred to therein cannot be invoked to supply a lack of jurisdiction or to construe a notice of appeal according to an intention in the mind of the drafter. Any effort to invoke Sec. 2111 for this purpose is putting the cart before the horse.

V

The rulings of this Court in the Hoiness case and the Arizona case are not contrary to the ruling of the Court below.

Petitioner cites the case of *Hoiness vs. United States*, 335 U.S. 297, 93 L. Ed. 16, 19. (Petition For Writ of Certiorari, page 15) In that case the trial Court made its first order on August 5, 1946, as follows:

> "It is ordered:
>
> "That the libel herein is dismissed for lack of jurisdiction, and that respondents have judgment for costs.
>
> "Counsel for respondents will submit findings of fact and conclusions of law in accordance with the rules of court and the opinion filed herewith."

Pursuant to the order of August 5, counsel for the Government presented findings of fact and conclusions of law on October 14, 1946, on which date the trial Court signed a decree that it had "no jurisdiction over the subject matter of the action, and that the libel be dismissed."

October 18, 1946, Appellant filed its notice of appeal stating that it was "aggrieved by the * * * *judgment and decree* made and entered herein on October 14, 1946." The Government moved to dismiss on the ground that the order of August 5, 1946 was the final decision and only appealable order.

It is not true, as stated at page 15 in the Petition For Writ of Certiorari, that "the petition for appeal referred solely to the order which was not appealable * * * *". An examination of the record in the *Hoiness* case discloses that the trial Court and all counsel considered the order of October 14, 1946 as the only final decision; otherwise, why did counsel for the Government present findings of fact and conclusions of law on October 14, 1946 and obtain a decree of the Court on said date dismissing the libel if such was not the final decision of the Court?

But the real basis of the decision of this Court in the *Hoiness* case was former *United States Code*, Title 28, Sec. 777, which has since been repealed. (June 25, 1948, 62 Stat. 992 c. 646, § 39.) Whether repealed Sec. 777 was carried forward, in part, in Rule 61 of the *Federal Rules of Civil Procedure* cannot help Petitioner in view of the decisions of this Court, supra: *Mookini et al vs. U.S.; United States vs. Sherwood;* also in view of the decisions of the Courts of Appeal, supra: *Audi Vision Inc. vs. R.C.A. Mfg. Co., Inc.: Board of Governors of Federal Reserve System vs. Trans-America Corp.:* and *Leonard vs. Socony-Vacuum Oil Co.* These decisions all hold that the *Federal Rules of Civil Procedure* (including Rule 61) apply only to the District Courts and that they do not prescribe or affect the appellate powers or the jurisdiction of Courts of Appeal. (See also Rule 1 of *Federal Rules of Civil Procedure* and Order of this Court dated June 3, 1935, supra.)

Petitioner next cites the case of *United States vs. Arizona*, 346 U.S. 907, 98 L. Ed. 405, in which this Court by a memorandum opinion reversed the lower Court. In this case the trial judge made the following order October 6, 1952:

> "IT IS ORDERED that the motion of the Third Party Defendants to dismiss the Third Party Complaint be and it is granted, and it is further ordered that this case be and it is dismissed without prejudice to the Third Party Defendants."

The Court of Appeals dismissed the appeal on motion of the State of Arizona on the ground that the notice of appeal referred only to that portion of the order of October 6, granting the motion to dismiss the third party complaint and not to that portion of the order dismissing the case. No judgment was entered in the case, and it is obvious that this Court treated the order of October 6, 1952 as one entire order, the date of which was correctly specified in the notice of appeal, and ruled correctly that the defect in the notice of appeal referring to that portion of the order dismissing the third party complaint was a mere technicality which should have been disregarded.

In the instant case, there was no failure to correctly describe the order from which the appeal was taken, as in *Shannon vs. Retail Clerks, Int. Protective Ass'n.*, 128 Fed(2d) 553, 555, and *Porter vs. Borden's Dairy Delivery Co.*, 156 Fed(2d) 798. The notice of appeal in this case twice referred to the order appealed from as being made on August 24, 1954, and further described that order as the order denying defendant's motion for new trial and denying defendant's motion to amend findings. Consequently there was no defect of a technical nature which could have been disregarded by the Court of Appeals.

VI

The real issue before this Court is one of jurisdiction of the Court of Appeals and not one of discretion.

Petitioner repeatedly states "No one was misled or injured," and cites *Voehl vs. Indemnity Insurance Co.*, 288 U.S. 162 at 177. (Petition For Writ of Certiorari, page 17). Counsel is in error in this citation. The quotation referred to is actually from the opinion of this Court in *Ohl and Company vs. Smith Iron Works*, 288 U.S. 170, 77 L. Ed. 681, 684. In the Smith Iron Works case this Court pointed out the distinction between the discretion of a Court where a question of practice was involved rather than one of jurisdiction by quoting from a former decision of this Court at page 683 of 77 L. Ed. as follows:

> "* * * thus, in Idaho and O. Land Co. v. Bradbury, 132 U.S. 509, 33 L. Ed. 433, 10 S. Ct. 177, the Clerk of the Court below in attempting to authenticate the record had appended the seal of the Court but had failed to comply with the rule of this Court in affixing his signature. The Court said (page 513): 'The question presented is not one of no authentication, but of irregular or imperfect authentication; *not of jurisdiction, but of practice.* It is therefore within the discretion of this Court to allow the defect to be supplied'."

The question involved in the instant case is not whether the respondent was injured or misled, but whether the jurisdiction of

the Court of Appeals was invoked by taking an appeal from the order denying the motion for a new trial instead of from the final decision of the District Court. In enacting *United States Code*, Title 28, Secs. 1291 and 1292, Congress prescribed that Courts of Appeal shall have jurisdiction to review the final decisions and the interlocutory decisions therein set forth.

United States Code, Title 28, Sec. 2106, further prescribes that this Court and the Court of Appeals may rule only upon judgments, decrees or orders of a Court "lawfully brought before it for review." Congress did not enact a law that the jurisdiction of the Court of Appeals could be invoked by a notice of appeal from an *order* denying a motion for new trial or "which refers only to the date on which a Motion for New Trial was denied" (Petition For Writ of Certiorari, page 13) so long as "no one was misled or injured".

For the reasons above stated the Petition For Writ of Certiorari should be denied.

Respectfully submitted,

JAMES R. MOORE
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Attorneys for Respondent

December 28, 1955

APPENDIX

APPENDIX

In the United States Court of Appeals for the Ninth Circuit

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, *Appellant,* vs. AUDRA H. PALMER, *Appellee.*	No. 14560 MOTION TO ALLOW AMENDMENT OF NOTICE OF APPEAL

COMES NOW Appellant, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, and moves this Honorable Court for an order allowing Appellant to amend its Notice of Appeal in accordance with said Amended Notice of Appeal attached hereto. Said Motion is made pursuant to the authority of the Court under Section 28, U.S.C. 1653.

SCOVILLE & LINTON
219 Heard Building
Phoenix, Arizona

By WALTER LINTON
Attorneys for Appellant

In the District Court of the United States for the District of Arizona

AUDRA H. PALMER, *Plaintiff.* vs. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, *Defendant.*	No. Civ. 1620 Phx. AMENDED NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, Defendant in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment entered by the District Court on the 6th day of July, 1954, granting Plaintiff a judgment against Defendant in the sum of Ten Thousand Dollars ($10,000.00), together with interest thereon at the rate of six per cent (6%) per annum from January 18, 1951 until paid, together with her costs incurred; and that certain order entered by the District Court on August 24, 1954, denying Defendant's Motion for New Trial and denying Defendant's Motion to Amend Findings of Fact and Conclusions of Law.

DATED this 7th day of February, 1955.

SCOVILLE & LINTON
219 Heard Building
Phoenix, Arizona

By WALTER LINTON
Attorneys for Defendant

Decisions Per Curiam.

No. 504. STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. *v.* PALMER. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Hoiness* v. *United States*, 335 U. S. 297; *United States* v. *Ellicott*, 223 U. S. 524. *Harold R. Scoville* for petitioner. *James R. Moore* for respondent. Reported below: 225 F. 2d 876.